Land Use Conflicts
Stakeholders, Mediation, & Policy

Texas Watershed Coordinator Roundtable
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Overview

- Alternative Dispute Resolution
- Negotiation concepts
- 5 Stages to creating Mutual Gains
ADR - Alternative To What?

- Conventional
  - Administrative Ruling
  - Courts/Judicial
  - Legislation
  - Regulatory Rule Making
  - Public Hearing
  - Arbitration

- Alternative
  - Ad Hoc
  - Facilitated
  - Mediated
  - Participatory
  - Iterative
ADR - Alternative To What?

**Conventional Approach**
- Assert Claims
- Bid High
- Show no fear/empathy
- Test of wills
- Lawsuits
- Log Rolling
- Media Blow Horn
- Referenda
- Legislation to reverse court decision

*Win/Lose-
A fixed pie*

**Alternative Approach**
- Begins with Questions
- Voluntary
- Consensus Oriented
- Face-to-face
- Collaborative
- Learning & Seeking
- Discuss
- Integrative

*Joint Gains-
Make the pie bigger*
The Promise...

- Better Public Policy
  - More Scientifically-based
  - More Economically effective
  - More Sustainable Results
  - More Politically Popular Results

- Developing working relationships

- Bigger pie
Candidates for (Land Use) Mediation

- Distributive Disputes
  - Development
  - Conservation & Restoration
  - Resource Management
  - Building & Siting
  - Mitigation
  - Standards setting

- **NOT** Constitutional or Human Rights
BATNA

► “Best Alternative to a Negotiated Agreement”

► What will I get if I’m not at the table?
  ▪ What happens if no agreement is reached?
  ▪ Strong/Weak, Real/Perceived?
  ▪ Risk averse or risk tolerant?

► Get them thinking outside of unilateral action
Positions vs. Interests

The infamous “Parable of the Orange”
Positions vs. Interests

- Positions = What we demand
- Interests = Why we demand what we demand
Mutual Gains: Five Stages

- Stage 1: Assessment/Convene
- Stage 2: Rule setting
- Stage 3: Deliberating
- Stage 4: Deciding
- Stage 5: Implementing

- Step 1: 10%
- Step 2: 5%
- Steps 3 & 4: 75%
- Step 5: 10%
### Who Should Be at the Table?

- Can they undermine a future agreement?
- Would they have legal standing?
- Can they help implement an agreement?
- Do they have an interest in the outcome?
Assessing the Conflict

- Confidential Participant Interviews
- Scan the landscape...
  - “What do you need from an agreement?”
  - “Why is this important to you?”
  - “What is concerning you about this situation?”
  - “Would we be moving in the right direction if…?”
  - “Do you feel you have a chance if…?”
  - “Who else should be here?”
What if the party is unwilling to be interviewed?

- Find out why
- Allay concerns by
  - Clarifying the purpose
  - Reiterating neutrality
  - Reassuring confidentiality
  - Explaining benefits of participation - More Pie
- Have another interviewee explain the above
- Is still unwilling, inform all the parties
  - Keep door open for future participation
Assessing the Conflict

Ready for Change?

- Is there a common concern over a well-defined issue?
- Are people frustrated with the status quo?
- Do people feel that the issue is timely?
- Are they uncertain about their BATNA?
- Do they feel the issue is negotiable?
- Do they desire more control over the outcome?
- Do they want to avoid an adversarial situation?
- Are they concerned about the costs of a prolong dispute?
- Do they desire a sense of closure?

Capacity for Change?

- Is there a clear constituency?
- Can credible representatives be identified?
- Are stakeholders willing to articulate their interests?
- Are public officials committed to the process?
- Are there resources to complete the process?
# Conflict Assessment Report

- **Identify, summarize, and map the range of interests**
  - Do not attribute

- **Provide Professional Assessment**

- **Distribute to all interested parties**

- **Ask for feedback**
  - Right now, this is how we see it.
  - Did we get this right?
  - Are your concerns in here?
Q: Stakeholder Representation?

- Why should the politically powerful participate?
- What if interviewee seems to be lying?
- What if interviewee cannot articulate interests?
- What if there is only one stakeholder in a group?
- Should representation be equal for all groups?
- Should public officials select representatives?
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**Be Clear About the Process**

- Role of facilitators
- Role of participants
- How the ad hoc process fits with the formal process
- Communication within group- outside of meetings
- Communication with constituency
- Communication with the media
- Role of outside experts
- A decision rule
- Participation of observers
- Participants opting in/out
- Meeting Management
  - Agendas, Documents, Meetings, Scheduling
Suggested Participant Responsibilities

**Basics**
- One person speaking at a time
- Don’t speak for others
- Avoid grandstanding
- No personal attacks

**Good faith participation**
- Active listening: Ask clarifying questions
- Keep fellow participants informed- “No Surprises”
- Identify common ground
- Reserves the right to disagree
  - Responsibility to offer an alternative proposal
- Abide by ground rules
Conventional Approach: Positional Decision Making

Convening | Rule Setting | Deliberating | Decision | Implementation

More Favorable Outcome

Point of Compromise

Jack

Less Favorable Outcome

More Favorable Outcome

Jill
Positional Decision Making

- Asking for things you don’t really need
- Erodes trust
- Devalue legitimacy of others’ claims
- Undermining accuracy of information

- Assumptions
  - Their gain is my loss
  - This is a test of wills
Mutual Gains Decision Making

- Convening
- Rule Setting
- Deliberating
- Decision
- Implementation

More Favorable Outcome

Less Favorable Outcome

Jack

Jill

Interest Oriented Dialogue

1

2

More Favorable Outcome

Mutual Gains Decision Making

1

Jill

More Favorable Outcome

Less Favorable Outcome

Mutual Gains Decision Making

Rule Setting

Convening

Deliberating

Decision

Implementation
Deliberating

- Breakdown the conflict into its defining elements
- Begin with low hanging fruit
- Go slow to go fast
- Learning about...
  - Other’s interests, options
  - Stories, examples, case studies
  - Expert guidance
  - Legal framework
  - Learning to engage, ask questions
  - Learning about feasibility of proposals
  - Standards of judgement

- Form, Storm, Norm, Perform
- The Goal: Create things to trade! Create Value!
Creating Value (Making More Pie)

- Explore all sides- Open discussion, brainstorming, stories
- Joint Fact Finding
- Analyze your own interests
- Suspend criticism
- Invent, don’t commit
- Generate options/packages
- Use caucuses and sub-committees
- Can local, state, federal agencies provide grant money- sweeten the pot?
- Insist on objective criteria
  ▪ Efficiency, Tradition, Reciprocity, Market, Science
- Behave in ways that build trust*
Facilitation Skills

► Active Listening
  ▪ Summarizing
  ▪ Clarifying
  ▪ Reframing
  ▪ Acknowledgement
  ▪ Normalizing
  ▪ Validating
  ▪ Soliciting

► Actual words, perceptions, body language, empathy = questions that go farther than facts alone
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## Ethical Issues

![Image of sumo wrestler and child]
Ethical Issues

- Are differences in stakeholder’s access to resources significant?
- Do participant fears they do not have enough ‘negotiation experience.’
- Are participants committing to agreements that are not feasible to implement?
- Which two stakeholders will never be at the table?
- What if gains aren’t equal?
Step 4: Deciding

- Maximize joint-gains - trade across differences, not compromise - “gain-gain”

- Holdouts: “Knowing what you know about your counterparts, what can you offer that satisfies your interests and theirs?”

- Establish contingencies - “What if…?”

- Follow decision rule

- Keep a record
  - Use Single Negotiated Text

- Evaluate Outcomes: Fair, Efficient, Wise, Stable
## Outcomes: Fair

- Was offer to participate genuine and given to all stakeholders?

- Were participants accommodating to each other’s needs?

- Were stakeholder concerns about the process addressed?

- Was the process perceived as legitimate? No one feels ‘taken’?

- Was a good precedent set? – “If it comes up again, we’ll know what to do.”
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Outcomes: Efficient

- Is there ‘unclaimed’ value on the table
Outcomes: Wise

- Did both sides work to minimize the risk of being wrong?
- Was good science and technical information used?
- Do they have the knowledge and resources to anticipate again the impasse created?
Outcomes: Stable

- Is the agreement feasible?
- Do the participants have the ability to take responsibility for the agreement?
- Are timetables realistic?
- Are there provisions for re-negotiation?
Linking to Formal Agreements

► Convert to legal contract
► Convert to statute, ordinance, or regulation
► Attach as conditions to permits, licenses or other legal authorizations
► Use bonds or escrow account until promises are met
► Involve public officials/managers in the process, or they may resist when you later seek their help in formalizing the agreement.
► Ensure each party has a continued interest in fulfilling the agreement
► Establish benchmarks and penalty clauses
► Consent decrees give courts the power to enforce the agreement
On the horizon...

- Group Dynamics
- Irrational Decision Making
- Joint Fact Finding
- Brainstorming Exercises
- Working with (not around) emotion
- Inside/Outside problem
- Social Justice
- Environmental Justice
- Working with social issues
  - Race, Ethnicity, Heritage, Culture, History
- Trust Building
  - Developing shared standards of judgment
4 Take Home Lessons

► Distinguish between Positions & Interests

► BATNA

► Substance guides process

► Creating value makes possible ‘trades’
Thank You!

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